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No. 96-1059

In The

Supreme Court of the United States

October Term, 1996

SYCUAN BAND OF MISSION INDIANS; MORONGO BAND OF MISSION INDIANS; SANTA ROSA BAND OF TACHI INDIANS; CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY; SOBOBA BAND OF MISSION INDIANS; ROBINSON BAND OF POMO INDIANS,

Petitioners,

v.

PETE WILSON, Governor of the State of California; and the State of California,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO STATE RESPONDENTS' STATEMENT OF THE CASE

In their Statement of the Case, State Respondents make some "clarifying remarks" which, unfortunately, tend more to obfuscate than to clarify. Petitioners will briefly respond only to those obfuscatory comments that might be relevant to the Court's determination whether to grant this Petition.

First, State Respondents would have this Court believe that in *Western Telcon, Inc. v. California State Lottery*, 13 Cal.4th 475, at 483 (1996), the California Supreme Court held that the California State Lottery ("CSL") cannot use what California Penal Code § 330b defines as "slot machines" to operate otherwise lawful lottery games. Brief in Opposition, p. 1, at fn.1. In fact, the California Supreme Court acknowledged that the CSL could use random number generators, on-line computers and video terminals to operate matching numbers and instant games, but expressly declined to reach or decide whether such electronic devices were "slot machines" within the meaning of Pen. Code § 330b:

> Because CSL may conduct only lotteries, and because CSL Keno, as described in the regulations, is not a lottery, CSL is not authorized to conduct its Keno game. We therefore need not decide whether CSL Keno also involves the use of slot machines, as plaintiffs further contend. Nor need we decide whether, as CNIGA contends, the Lottery Act grants CSL a complete exemption from the antigaming provisions of

> chapter 10, so that it may conduct any authorized game whether or not the game is prohibited by Penal Code § 330, uses slot machines, or violates other statutes in chapter 10.

13 Cal.4th 475, at 496.

Second, State Respondents have grossly mischaracterized Petitioners' position regarding the scope of gaming "permitted" in a State for the purposes of IGRA. Petitioners do not contend that, " . . . all gambling activities – including those expressly prohibited by state law – are permitted in California for purposes of IGRA, because California has a general 'regulatory' policy towards gambling." Brief in Opposition, p. 3. Rather, Petitioners actually contend only that,

> . . . a state "permits" a specific gaming activity if it "regulates" the activity in general rather than prohibiting it entirely as a matter of public policy. Under this approach, a specific illegal gaming activity is "regulated," rather than "prohibited," if the state allows the operation of similar gaming activities.

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Finally, State Respondents either have missed or mischaracterized the point of Petitioners' illustration of the ways in which California permits some forms of banked or percentage gaming while prohibiting others. Brief in Opposition, p. 5. The point of that illustration was to demonstrate that the Court of Appeals' inconsistent construction of IGRA would allow the State arbitrarily to constrict Tribes to negotiating about specific subcategories of Class III gaming even as the State's public policy

does not criminally prohibit the broader categories of Class III gaming within which the subcategories fall.

ARGUMENT

I. The Circuits Clearly Disagree On The Question Whether The Permissible Scope Of Class III Gaming Under IGRA Is To Be Determined By *California v. Cabazon*'s Public Policy Test, Or By What State Law Expressly Authorizes.

State Respondents first assert that, " . . . whether some in the State are, in fact, permitted to engage in the form of gaming proposed by the Tribes is a simple question of fact not presented by the parties to the federal courts for disposition." Brief in Opposition, p. 6. This assertion begs the question that this case has presented since its inception; *i.e.*, the intent of Congress when it provided in 25 U.S.C. § 2710(d)(1)(B) that Class III gaming activities shall be lawful on Indian lands only if such activities are, *inter alia*, " . . . located in a State that permits such gaming for any purpose by any person, organization or entity."

The Court of Appeals in this case clearly held that the word "permits," when used in 25 U.S.C. § 2710(b)(1)(A) to determine whether a Tribe may engage in Class *II* gaming, has a completely different meaning than when used in 25 U.S.C. § 2710(d)(1)(B) to determine whether and to what extent a Tribe may engage in Class

III gaming on its Indian lands. According to the Court of Appeals, whether a State "permits" Class II gaming is to be determined according to the public policy test of *California v. Cabazon*, 480 U.S. 202 (1987),[1] while the scope of Class III gaming that a State "permits" is to be determined solely by what State law affirmatively authorizes other persons or entities to conduct. *Rumsey v. Wilson*, 64 F.3d 1250, 1258 (1995).

The six Circuit Judges who would have granted the Tribes' petition for rehearing *en banc*, *Rumsey v. Wilson*, *id.*, 64 F.3d at 1253, n. 1, pointed out that the panel should have focused on the entire phrase "permits such gaming," rather than isolating only on the word "permits," and noted that the Second Circuit, in *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990), just as clearly held that the phrase "permits such gaming" is to be given exactly the same meaning when applied to either Class II or Class III gaming.

State Respondents attempt to blur this clear conflict between the two Circuits by contending that the Ninth Circuit's decision in this case dealt with gaming that is "categorically" prohibited in the State, while the Second Circuit's decision in *Mashantucket Pequot Tribe v. State of Connecticut* dealt with gaming that, at least to some degree, was allowed by State law. As demonstrated by the language of not only the Second Circuit in *Mashantucket Pequot*, but also the Tenth Circuit in *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), vacated and remanded for reconsideration in light

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[1] *I.e.*, whether the State criminally prohibits all Class II gaming activity as a matter of public policy.

of *Seminole Tribe of Florida v. State of Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996),[2] this is a distinction without a difference, and simply begs the question presented by this Petition; *i.e.*, whether the scope of Class III gaming that a State "permits" within the meaning of 25 U.S.C. § 2710(d)(1)(B) is to be determined by examining the State's public policy toward broad categories of Class III gaming (such as wagering on the outcome of horse races, card games and lotteries), or by a detailed search for express statutory authorization not only for each broad category of Class III gaming, but also for each specific Class III game and variation thereof within each broad category, and even such details as proposed prize levels,[3] game themes, days and hours of operation, *etc.*

There simply is no way to reconcile the decision of the Ninth Circuit in this case with the Second and Tenth

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[2] "If a state has a policy prohibiting all Class III gaming, then Indian Class III gaming is also automatically prohibited. 25 U.S.C. § 2710(d)(1)(B). If it has any other less restrictive policy or preference regarding Class III gaming in particular, or Class III gaming on Indian lands specifically, nothing in IGRA requires the state to surrender or compromise those policies or preferences in attempting to negotiate a compact with the Indian tribe. Of course, the federal government may ultimately override state policy by regulation [fn. om.] imposed by the Secretary of the Interior, . . . " *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d, *supra*, at 1434.

[3] In *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993), the Eighth Circuit held not only that the State need not negotiate about traditional keno when State law authorized video keno, but also that the State need not negotiate about converting a concededly lawful Class II card game into Class III activity by offering higher wager limits than allowed under State law.

Circuits' conclusion that unless *California v. Cabazon*'s public policy test is used to ascertain the scope of Class III gaming that a State "permits" within the meaning of IGRA,

> The compact process that Congress established as the centerpiece of the IGRA's regulation of Class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

Mashantucket Pequot Tribe v. State of Connecticut, supra, at 1030-1031.

According to State Respondents [Brief in Opposition, p. 6], the premise of this case is that the Tribes may "conduct gaming activities that are prohibited to all within the state[.]" This is a gross mischaracterization of the Tribes' position.

The actual premise of Petitioners' case is that because California's public policy is to allow 1) a broad spectrum of gaming activities, including widespread Class II activity (bingo, pulltabs – which Pen. Code § 330c includes within the definition of "slot machine" – and numerous card games without any limits on wagers, pot sizes or operating hours) and 2) broad categories of Class III activity,[4] and because State law authorizes the CSL to use random number generators, on-line computers, player-actuated video terminals and even playing cards to conduct on-line numbers games and instant games, California Tribes are entitled to negotiate for compacts that authorize the Tribes to use random number generators,

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[4] *California v. Cabazon, supra.*

on-line computers, player-actuated video terminals and playing cards to operate lotteries and any other form of Class III gaming that the State's public policy does not criminally prohibit, even if a specific form of gaming is not expressly authorized by State law, and even if some of the equipment used to conduct such gaming would come within the State's definition of a "slot machine."

II. The Judgment Of The Ninth Circuit Is Poorly Reasoned And Betrays Both Congressional Intent And The Plain Language Of IGRA.

State Respondents contend that under 18 U.S.C. § 1166(a) and (b), California's gambling laws apply to Petitioners' activities on Indian lands without regard to whether California's public policy toward gambling in general is "regulatory" or "prohibitory," and thus that application of *California v. Cabazon*'s public policy test to determine the scope of Class III gaming allowable under a compact "would render the statutory scheme virtually unintelligible." Opposition Brief, at p. 9. This contention both ignores 18 U.S.C. § 1166(c),[5] and completely misconceives the nature and purpose of the compacting process. To the extent that the Ninth Circuit's decision may be

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[5] "(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect."

read to accept such an analysis, the need for this Court's review is that much more compelling.

18 U.S.C. § 1166(a) clearly assimilates State gambling laws, regulatory and prohibitory, into federal law, and makes those laws applicable to Indian country. However, jurisdiction to enforce those laws is vested exclusively in the United States. Just as clearly, however, 18 U.S.C. § 1166(c) *excludes* from the definition of "gambling" all Class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of IGRA and that is in effect. Thus, IGRA expressly contemplates that Tribal-State Class III gaming compacts will authorize Tribes to conduct gaming activity that otherwise would violate State gambling laws, a result that would be impossible under the decision of the Court of Appeals in this case.

III. Petitioners Do Not Seek To Define The Parameters Of The Secretary Of The Interior's Authority, But Only The Scope Of Class III Gaming For Which The Secretary May Prescribe Procedures.

State Respondents argue that Petitioners improperly are seeking to use this action to define the parameters of the Secretary of the Interior's authority to prescribe procedures under which a Tribe may conduct Class III gaming pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii). Brief in Opposition, p. 10. This completely mischaracterizes Petitioners' objective.

Rather, Petitioners seek only to establish the criteria by which to determine the scope of Class III gaming that a State permits, whether for the purposes of compact

negotiations or Secretarial prescription of Class III procedures, if and when the Secretary invokes his/her authority to prescribe such procedures under IGRA. Thus, this crucial issue is ripe for decision now, and should be decided in this case. To do otherwise would indefinitely postpone a decision vital to the economic lifeblood of many Tribes throughout the country, and especially to Tribes within the Ninth Circuit.[6]

IV. Petitioners Do Not Object To Deferral Of The Disposition Of The Petition.

Nine of the other Tribes involved in this case in the court below have suggested that disposition of the Petition be deferred pending the outcome of compact negotiations currently in progress between the State of California and the Pala Band of Mission Indians.[7] Petitioners do not oppose that suggestion.

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[6] Petitioners and most of the other Tribes involved in this case have been trying since 1991 to obtain Class III compacts with the State of California; this case has been pending since 1992.

[7] Although 25 U.S.C. § 2710(d)(3)(A) expressly authorizes Tribes already conducting Class III gaming activity on Indian lands to request negotiation of compacts, the State of California refuses to negotiate with any Tribe that the State contends is engaged in uncompacted Class III gaming activity, even though the Tribes commenced that activity in the good faith belief that it constituted Class II gaming. *See, e.g., Cabazon Band, et al., v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *cert. den.*, 114 S.Ct. 2709 (1994); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), *cert. den.*, 116 S.Ct. 297 (1995).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the Petition, if and when the Court acts on the Petition for writ of certiorari, the Petition should be granted.

DATED this 6 day of March, 1997.

Respectfully submitted,

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